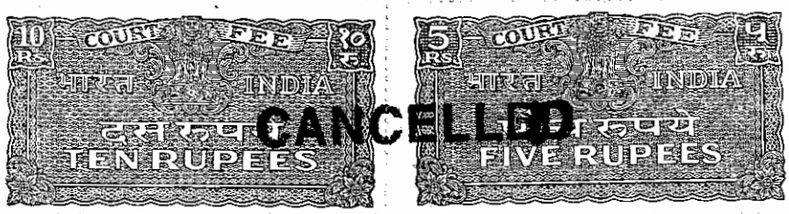

(3)

(A3002)
4-3-05

IN THE HIGH COURT OF JUDICATURE CHHATTISGARH
AT BILASPUR

SINGLE BENCH

MISC. APPEAL NO. 452 / 2005

APPELLANT (Defendent) : M/s Kay Iron Works Private Limited Registered Under Indian Companies Act having its Registered Office at Yamuna Nagar, District Yamuna Nagar (Haryana)

VERSUS

RESPONDENT (Plaintiff) M/s Everest Cement Company Limited Raigarh (A Company registered under the Indian Companies Act) having its registered office at Everest House Danipara Raigarh Tahsil and District Raigarh (Chhattisgarh)

P.R. No. 910/05
Presented by Shri Kashif Siddiqui
dated 10-9-05

MISCELLANEOUS APPEAL U/S 39(1)(VI) OF THE ARBITRATION ACT 1940

(32)

AFR

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... M:A:No:452/05 ..... **सन् 200**

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
	09-05-2005 Appellant/defendant by Shri P. Diwakar, Sr. Advocate with Shri P.R.Patankar, Advocate. Heard on admission as well as on the application (M.C.P.No.587/2005) for stay. Brief facts of the case are that the agreement dated 25th July 1998 between the parties contained arbitration clause whereunder in case of a dispute, the parties could refer it for arbitration of a single arbitrator. However, in the event both the parties not agreeing for the appointment of single arbitrator, each party was to nominate one arbitrator of his choice. The dispute was then to be referred to such arbitrators under the Arbitration Act 1940. In pursuance of the above arbitration clause, the defendant/appellant appointed Mr. Vijay Bhatia to act as its arbitrator and the plaintiff/respondent appointed Mr. Ravishankar Jha to act as its arbitrator. However, despite several notices issued by Mr.Vijay Bhatia the arbitrator for the defendant/appellant, Mr. Ravishankar Jha the arbitrator for the plaintiff/respondent completely neglected to participate in the proceedings. Thereafter, the defendant/appellant issued a notice dated 09.02.2004 to the plaintiff/respondent to appoint any other arbitrator within 15 days, failing which his arbitrator Mr. Vijay Bhatia would proceed to act as sole arbitrator in the above proceeding. Despite issuance of such notice, the plaintiff/respondent did not appoint a fresh arbitrator	

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -2-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

whereupon Mr. Vijay Bhatia acting as the sole arbitrator entered upon the reference and passed an award of Rs.71.372 lakhs in favour of the defendant/appellant and against the plaintiff/respondent.

The plaintiff/respondent preferred an objection under Section 30 of the Arbitration Act alleging inter alia that the sole arbitrator had not considered the claim of the plaintiff/respondent.

The lower Court by passing the impugned order dated 09.02.2005 held that the defendant had no authority to appoint Mr. Vijay Bhatia as the sole arbitrator since the agreement between the parties did not contain such a clause. It also held that Mr. Vijay Bhatia did not request the Court to appoint him as the sole arbitrator. On these grounds, the lower Court held that the award passed by Mr. Vijay Bhatia being with mala fides was not lawful. Consequently, the lower Court set aside the award dated 24.3.2004 passed by Mr. Vijay Bhatia under the impugned order and gave opportunity to the parties to appoint fresh arbitrators.

Record is perused. Section 9 of the Arbitration Act, 1940 reads as under:

> **9. Power to party to appoint new arbitrator or in certain cases, a sole arbitrator.--** Where an arbitration agreement provides that a reference shall be to two arbitrators, one to be appointed by each party, then unless a different intention is expressed in the agreement.

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मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश — 3 —	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

(a) If either of the appointed arbitrators neglects or refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place

(b) If one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for fifteen clear days, after the service by the other party of a notice in writing to make the appointment such other party having appointed his arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent:

Provided that the Court may set aside any appointment as sole arbitrator made under clause (b) and either, on sufficient cause being shown allow further time to the defaulting party to appoint an arbitrator or pass such other order as it thinks fit.

Thus under Section 9 of the Arbitration Act, 1940 upon neglect by one of the arbitrators to participate in the arbitration proceedings, the other party may serve the defaulting party with a 15 days clear notice to appoint another arbitrator and upon such failure appoint his arbitrator to act as a sole arbitrator in the reference and his award shall be binding on both parties as if he had been appointed by consent.

It is clearly borne out that Mr. Ravishankar Jha, the arbitrator appointed for the plaintiff/respondent had grossly neglected to participate in the arbitral proceedings which gave the authority to the defendant /appellant under Section 9 of the Arbitration Act, 1940 to appoint his arbitrator Mr. Vijya Bhatia

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उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -4-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

to act as the sole arbitrator. A notice as contemplated under Section (9) (b) of the Arbitration Act, 1940 was also given by the appellant/defendant in this regard. Thus Mr. Vijay Bhatia, the arbitrator for the appellant/defendant assumed, in law, the authority to act as the sole arbitrator. However, a perusal of the documents filed by the appellant/defendant and the proceedings drawn by Mr. Vijay Bhatia clearly go to show that at no point of time, after the notice dated 9.2.2004 given by the defendant/appellant, Mr. Vijay Bhatia acting as the sole arbitrator had issued a notice to the respondent/plaintiff to file any claim/objections before him. Counsel for the defendant/appellant has also not been able to demonstrate this from the record. The award passed by the arbitrator Mr. Vijay Bhatia also shows that he had completely shut his eyes so far as the claim of the plaintiff/respondent was concerned. The proceedings drawn by the arbitrator also do not show that he had entered upon the reference as a sole arbitrator. Placing reliance upon Jayatilal Keshavlal Dave Vs. Surendra Gangsa Johrapurkar **A.I.R. 1956 Nagpur 245,** paragraph 16 and Punjab State and another vs. Chander Bhan Harbhajan Lal and anoter, **A.I.R. 1964 Punjab 424** it is held I hold that non-consideration, in its entirety, of the claim of the plaintiff/respondent, by the sole arbitrator amounts to mis-conducting the arbitration proceedings by the arbitrator and would constitute a valid ground for setting aside the arbitral award passed by the sole

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मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -5-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

arbitrator Mr. Vijay Bhatia under Section 30 of the Arbitration Act, 1940.

As regards the finding of the lower Court that the arbitrator Mr. Vijay Bhatia had acted with mala fides or in other words had misconducted himself is concerned, this ground is not made out. The finding of the lower Court that the defendant did not have the right to appoint Mr. Vijay Bhatia as the sole arbitrator is also not tenable in view of the neglect by the arbitrator Mr. Ravishankar Jha in participating in the arbitral proceedings. On the other hand, it is clear that Mr. Vijay Bhatia, the sole arbitrator had clearly misconducted the proceedings by not issuing a notice to the plaintiff/respondent for filing claim/objections and by completely ignoring the claim of the plaintiff/respondent. Thereby the award passed by him on 24.03.2004 was liable to be set aside under Section 30 of the Arbitration Act, 1940 and the lower Court was justified in ordering appointment of fresh arbitrators which power was vested in it under the proviso to Section 9.

The lower Court ought to have considered the above aspect of the matter while deciding the objection preferred by the plaintiff under Section 30 of the Arbitration Act 1940. Had it done so it would have set aside the arbitral award and the appointment of the sole arbitrator under the proviso to Section 9 on the ground of the arbitrator misconducting the proceedings.

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मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश - 6 -	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
Anjani	In the result, the parties are directed to appear on 27.06/2005 before the lower Court which shall give another opportunity to both the parties to nominate fresh arbitrator (i.e. other than Mr. Vijay Bhatia & Mr. Ravishankar Jha) and thereafter proceed to refer the matter for arbitration to the arbitrators so appointed. The operative portion of the impugned order is maintained. With the aforesaid direction, the appeal is disposed of. **Sd/-** **Dilip Raosaheb Deshmukh** **Judge**	